

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

**United States Court of Appeals for the
District of Columbia**

JANUARY TERM, 1940

FILED MAY 17 1940

No. 7610

Joseph W. Stewart

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HOPE D. LESTER, PLAINTIFF IN ERROR,

vs.

**SUPERIOR MOTOR CARS, INC., A CORPORATION,
DEFENDANT IN ERROR.**

BRIEF FOR DEFENDANT IN ERROR.

**FRANK PALEY,
SAMUEL B. BLOCK,**
Attorneys for Defendant in Error.

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Statement of Facts.

In March of 1938 plaintiff purchased from defendant a 1932 used Ford Coupe, and during the course of his testimony in the lower court recited what he claimed to have occurred when he made the purchase, and that he returned the car to defendant for work, but he did not state what work was necessary. He presented in evidence certain repair bills commencing May 8, 1938, almost two months after the purchase, and extending from that time until more than thirteen months after the original purchase. These repairs are itemized in the Particulars of Demand, which have been made a part of the record. Upon the conclusion of plaintiff's testimony, defendant moved to strike

all evidence pertaining to the repairs made by plaintiff, on the ground that such repairs were not a proper element of damage. The motion was overruled by the court with leave to renew the motion at the end of all the evidence. This is agreed to in the Bill of Exceptions, but is not mentioned in plaintiff's brief. Defendant introduced in evidence the Conditional Sales Contract, which was identified by the plaintiff, and rested its case. The Conditional Sales Contract contained these words "or if used or second hand, has been examined by the Buyer and accepted in its present condition." Defendant then rested and moved for a directed verdict based upon all the evidence, which was granted.

Argument.

This case concerns the purchase by the plaintiff from the defendant of a used car, a 1932 Ford Coupe, which was at least six years old at the time of purchase. The plaintiff is endeavoring to recover damages, based upon misrepresentation, said damages consisting of the amount paid by the plaintiff for the automobile and certain repairs made to the automobile by the plaintiff beginning about two months after the purchase and extending for a period of more than thirteen months after the original purchase.

Plaintiff bases his case on the alleged fact that he had stated to the agent of the defendant that he required an automobile in good running condition, and that the agent showed him the car which he subsequently purchased, and stating that said automobile was in good running condition.

The testimony of the plaintiff did not disclose that the car would not run, or take care of his needs, nor did the plaintiff testify at any time as to the work needed on the car, on the various occasions he was alleged to have returned the car to defendant for work. There was absolutely no evidence to support plaintiff's contention that

the condition of the car had been misrepresented to him, other than the repair bills which he introduced in evidence, and it is respectfully suggested to the Court to examine the various repairs made by the plaintiff and it will be self evident that these repairs were the result of usage by the plaintiff and not latent defects. Certainly the plaintiff has not shown fraud on the part of the defendant for in the case of *Andrews v. Bankers and Shippers Insurance Company*, 281 P. 1091, it was held:

“To constitute fraud it must be made to appear that a false representation was made as to a material fact; that the representation was false and made knowingly or without reasonable grounds for belief in its truth”.

Even conceding that a warranty was made with the car, it is the universal rule that the measure of damages for breach of warranty is the difference between the actual value of the article sold and what it would have been worth, had it been as warranted. This rule is followed by all the authorities and by this Court also, as decided in the case of *Fries, Beall & Sharp v. Livingstone*, reported in 56 App. D. C. 209.

Plaintiff seems to place a great deal of dependence in the fact that the conditional sales contract signed by him contained much writing in fine print. Nevertheless when he had the opportunity to testify before the court he did not state that he was deprived of the privilege of reading it and this Court speaking through Mr. Chief Justice Shepard in the case of *Toledo Computing Scale Co. v. Garrison*, 28 App. D. C. 243, said:

“The mere fact that a contract presented for signature to one who is able to read and write and understand it fully, and who is not prevented from reading it by some artifice of the other party, is represented to amount to nothing more than a simple receipt, is not

sufficient to avoid it on the ground of fraud; it will not do for him to say he did not read it, or did not know its contents."

Conclusion.

It is therefore respectfully submitted to the Court that upon the failure of the plaintiff to show that any fraud had been practiced upon him, the doctrine of *caveat emptor* does apply in this case; that the damages attempted to be proven by the plaintiff constitute repairs necessitated in the normal use of an automobile and could reasonably be expected in an automobile more than six years old, and not latent defects, or such defects known to the defendant and withheld from the plaintiff; and having purchased an article, which was usable for all reasonable purposes; the damages alleged and attempted to be proven do not constitute the proper measure of damages even if there had been a breach of warranty.

It is universally accepted that a used automobile must have received reasonable wear and tear and the fact that one part may be worn more than another could not be such latent defect as to hold the vendor responsible therefor, and the rule of *caveat emptor* in such cases must be strictly adhered to.

The judgment of the court below should be affirmed.

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